IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION.

WRIT PETITION No.2267/2004

The Chairman
Shri Chhatrapati Shivaji
Maharaj Shikshan Sanstha & Anr. ..Petitioners.

V/s.

Chandrashekhar S. Giwari & Ors ..Respondents.

Mr Girish Godbole with Nitin Muley for the Petitioners.

Mr N. P. Shimpi for Respondent No.1.

Mr L. T. Satelkar, A. G. P. for Respondent No.2.

CORAM: V.C. DAGA,J.

DATED: 23rd March,2007.

JUDGMENT.
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1. Petitioners-the school and its Management have challenged the judgment and order dated 13th April, 2004 passed by the School Tribunal, Mumbai in Appeal No.MUM/108/1997, setting aside the order of termination dated 31st March, 1996; and directing reinstatement of respondent no.1 on the post of Peon with full backwages and other consequential benefits.

FACTS:-

. Factual background, in nutshell, is as under:-

2. Respondent no.1 herein was appointed as a Peon on probation by an order dated 1st February,1995 for a period of two years in the petitioner no.2 school run by the respondent no.1 Trust. The said appointment of respondent no.1 was approved by the Education Inspector vide his order dated 15.11.1995 for one academic session i.e. till the expiry of 30th April, 1996 subject to the condition that backlog should be filled in.

3. At this juncture, it will be relevant to note that the appointment of the respondent no.1 as a Peon was in a permanent post which became available on account of promotion of one Shri Sawant to the post of Laboratory Assistant. The petitioner-Trust had adopted unanimous resolution to appoint and absorb respondent no.1 in the said vacant post of Peon. By virtue of the very same resolution, Trust resolved to appoint one more peon on the newly created additional post of Peon reserved for such category.

4. The services of the respondent no.1-Peon came to be terminated by an order dated 29th March, 1996 with effect from 30th April, 1996.

5. It appears that there were inter-se, disputes between the members of the Management. With the result, on 6th August, 1996 the Administrator came to be appointed to take over the charge, Management and administration of the petitioner no.2-school. With the result, Administrator stepped into the shoes of the Management of the School.

6. The respondent no.1 on 6th November, 1996 made a representation to the Administrator; stating therein that he was honestly serving the subject school; that he was appointed on probation; that his services were terminated after expiry of one year; that the Trust management though assured him that he would be taken up in service but in view of internal disputes in the Management, no appointment order could be issued, however,he continued to attend the school but he was not allowed to put his signature on the Daily Muster Roll. He, thus, requested the Administrator for an appropriate action so as

to make his employment available to him.

7. The Administrator, after receipt of the aforesaid representation, directed the Head Master of the school to seek approval from the Education Department to the proposal of his continuation in the employment of the school and permitted respondent no.1 to sign Daily Muster Roll of the school. It appears that as directed; necessary approval was sought by Head Master and by letter dated 9th February, 1997 the Education Inspector granted approval to the continuation of the respondent no.1 for the period 1.5.1996 to 30.4.1997 showing the nature of his appointment as 're-appointment'.

8. It appears that after some litigation the old Management again took over the administration of the school on 21st February, 1997. With the result, tenure of the administrator came to an end. The old Management, after taking over the administration of the school, terminated services of respondent no.1 by notice dated on 31st March, 1997 with effect from 20th April, 1997.

9. Respondent no.1 by his letter dated 27th

May, 1997 made a complaint to respondent no.2-the Education Inspector complaining that he did not receive his salary for the academic year 1996-97. Reliance was placed on the approval order of the Education Inspector dated 19.2.1997. The respondent no.2 taking cognizance of the said complaint sent a letter to the Incharge Head Master of the school on 12.6.1997, calling upon him to furnish explanation, as to why respondent no.1 was not paid his salary for the academic year 1996-97 and as to why respondent no.1 was prevented from putting his signature on the Muster Roll even though his appointment was approved by the Education Department. No reply appears to have been received from the Incharge Head Master by the Education Inspector.

10. Since the services of respondent no.1 were terminated by a letter dated 31st March, 1997, he filed appeal under Section 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, (3 of 1978), (for short "the Act")before the School Tribunal at Mumbai alongwith application for condonation of delay. The said appeal was contested by the petitioner-Management contending that respondent no.1 was never

re-appointed as employee of the school as such there was no relationship of Master and servant between school Management and respondent no.1. It was also sought to be canvassed that the Administrator had no authority to enter the name of respondent no.1 in the Daily Muster Roll and to permit him to sign Muster Roll.

11. It was also canvassed before the Tribunal that in the year 1996; one Ranvijay Sureshchandra had been appointed as a Peon in the School by the then Secretary. However, his services came to be terminated by the order dated 30th March, 1999 with effect from 30th April, 1999 and that the appeal filed by him challenging his termination was pending before the School Tribunal. As such, no interim or final order could be granted in favour of respondent no.1. The petitioners also filed their reply opposing prayer for condonation of delay.

12. The learned Presiding Officer vide order dated 3rd April, 2004 allowed appeal filed by respondent no.1 and dismissed the appeal filed by Mr Ranvijay Sureshchandra.

13. Being aggrieved by the aforesaid order of the Tribunal, dated 13th April, 2004, petitioners have invoked the writ jurisdiction of this Court under Article 226 of the Constitution of India.

14. On being noticed, respondent no.1 appeared and filed affidavit-in-reply dated 6th March, 2007 and 12th March, 2007 together with the documents which were taken on record in view of absence of contest from the petitioners. With this factual matrix on record, this petition was heard.

SUBMISSIONS:-

15. Mr Godbole,learned counsel appearing for the petitioner, taking me through the factual gamut of the matter, urged that, after the first termination order whereby services of the respondent no.1 were terminated, no fresh appointment order was issued in his favour. As such, there was no master and servant relationship between petitioner and respondent no.1. He, thus, submits that in the absence of relationship of employee and employer,there was no reason for the School Tribunal to entertain and allow appeal filed by respondent

no.1.

16. Mr Godbole, further, urged that since the approval was for a period of one year i.e. upto 30th April, 1996, the Management was perfectly justified in terminating services of the respondent no.1 after the expiry of the period of approval. Thus, the action of the Management was perfectly legal and valid. He, thus, submits that the impugned order is liable to be quashed and set aside.

17. Per contra, learned counsel appearing for respondent no.1 urged that the appointment of the respondent no.1 was on probation for a period of two years with effect from 14th December, 1995. His services could not have been terminated; since at no point of time any dissatisfaction with regard to his conduct or work was felt by the school Management. He further submits that Management was well aware of the fact that approval is normally granted by the Education Department on year to year basis even though employee is appointed for two years on probation. He, thus, submits that it was not open for the Management to terminate services of respondent no.1 merely relying on the approval of the Education

Department which was upto 30th April, 1997. In his submission, approvals are meant only for reimbursement of salary grant to the school Management.

18. Learned counsel for the respondent no.1 further urged that it is not uncommon in the educational institutions to terminate services of the employee and to reappoint them in the ensuing academic session. He went one step ahead and urged that it is also not uncommon in the educational institution to take work from the employees during the intervening period i.e. between the period of termination and re-appointment. He, further, urged that though services of respondent no.1 were terminated with effect from 30th April, 1996 by the petitioners vide their letter dated 29th March, 1996, but the said termination order was not acted upon and that the respondent no.1 kept reporting on work without any interruption. That, in the meanwhile, interse disputes cropped up between the members of Management. With the result, no fresh appointment order could be issued in favour of respondent no.1, though he continued to work without any break.

19. Learned counsel for the respondent no.1 further tried to impress upon this Court that since, inter-se disputes between management cropped up; none of the groups had a right either to say that respondent no.1 should not report on duty or that fresh appointment order should be issued in his favour. In his submission, within a period of three to four months, the inter-se disputes went to such an extent that, ultimately, the Judicial Authorities were required to intervene and appoint Administrator to administer the affairs of petitioner no.2 school.

20. Learned counsel for the employee further states that this factual aspect was brought to the notice of the Administrator. It was pointed out to him that in the absence of fresh appointment order Head Master of the school is not permitting him to put his signature on the Muster Roll and that he has not been paid his salary, that the order of termination was never acted upon and that his services were never found to be unsatisfactory by the Management, as such he should be treated as a person in the employment, and appropriate steps should be taken to see that he is not deprived of his employment.

21. According to the learned counsel for respondent no.1, the aforesaid representation so made by the respondent no.1-employee found favour with the Administrator; who was pleased to direct the Incharge Head Master of the school to forward proposal to seek approval to the continuation of the employment of respondent no.1. Accordingly, proposal was processed and approval was obtained from the Education Department which was received by the school Management vide their letter dated 19th February, 1997. In his submission though the said approval mentions "re-appointment" but it was a misnomer. It was not a case of reappointment. He submits that the Administrator was convinced of the fact that the termination order was never acted upon and that it was not legal and valid since termination of probationer could only be for unsatisfactory work. The Administrator, therefore, did not find it necessary to issue fresh appointment order. Alternatively, he urged that when the Administrator himself permitted to respondent no.1 to sign Muster Roll, that by itself, may have been treated as a fresh appointment. If that be so, according to him, as per Section 5 (4) of the

M.E.P.S.Act, if the services of probationer are terminated and he is reappointed by the Management in the same school within a period of one year from the date on which his services were terminated; then the period of probation undergone by him, previously, is required to be taken into consideration in calculating required period of probation for the purpose of sub-Section (2). He, thus, submits that respondent no.1 had become a permanent employee of the school, therefore, the School Tribunal was perfectly justified in allowing his appeal and directing his reinstatement with finding that termination was bad and illegal.

22. Learned counsel for respondent no.1, thus, submits that the impugned order of the School Tribunal is perfectly legal and valid and this Court not being court of Appeal should not reappreciate evidence and facts, once again and interfere with the impugned order. He, thus, prayed for dismissal of the writ petition with costs.

CONSIDERATION:-

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23. Having heard rival parties, it is not in

dispute that there was unanimous resolution of the school Management to appoint respondent no.1 on probation for a period of two years on the vacant post of peon and one more candidate was to be appointed on newly created post of Peon as a reserved category candidate. Thus, it is clear that the respondent no.1 came to be appointed as a Peon on probation in a open, clear and permanent vacancy against Roster Point No.6 meant for open category candidate.

24. It is also not in dispute that pursuant to the appointment of respondent no.1, approval was sought from the Education Department; which was granted for a period of one year vide letter dated 15.11.1995 upto 30th April, 1996. It is also not in dispute that the post of Peon was very much available with the School Management and appointment to the said post was necessary to man the said post.

25. It is not in dispute that no material is available on record to know as to why services of respondent no.1 were terminated by order-cum-letter dated 29th March, 1996 with effect from 30th April, 1996. No material is on record to suggest that the work or

behaviour of respondent no.1 was unsatisfactory.

26. It is not in dispute that the post of Peon was in open category and it was a permanent vacant post. Respondent no.1 worked with the petitioner w.e.f. 1.2.1995 to 30.4.1996 in a permanent vacancy; which arose due to the promotion of one Mr Sawant as Laboratory Assistant. The respondent no.1 came to be appointed on probation against the vacant post, and, that too, in the open category in view of unanmimous resolution passed by the petitioner-Trust. He was appointed at Roster point no.6 meant for open category candidate. It appears that though the services of respondent no.1 were terminated on 29.3.1996 with effect from 30th April, 1996 but the order of termination was never acted upon.

27. Having taken survey of the factual aspects, one has to reasonably infer what must have happened between the period when first order of termination was issued and the appointment of the Administrator was made. It is not in dispute that the respondent no.1 was appointed on probation. It is also not in

dispute that no material is on record to suggest that the services of respondent no.1 were unsatisfactory or his conduct was bad warranting termination of his services. The termination order contains only one reason that the approval was upto 30th April, 1996. In the absence of any other reason, there was no difficulty to continue him in the service subject to further approval. However, in view of inter-se disputes between the Management, no action in the matter of further appointment appears to have been taken though the respondent no.1 appears to have kept reporting on duty.

28. In between it appears that administrator stepped in. The respondent no.1 continued to render his services without putting his signature on the Daily Muster Roll. When he made representation and brought the factum of illegal termination to the notice of Administrator; the Administrator must have gone through the record and must have noticed absence of any valid reason for termination of a person appointed on probation for want of any adverse material on record. He, thus, appears to have permitted respondent no.1 to put his signature on the Muster Roll. This

appears to be a scenario leading to the continuation of the services of the respondent no.1 and consequent steps taken to seek necessary approval from the Education Department of the State. In the meanwhile, he continued to work till receipt of the approval. That is how, it appears that the respondent no.1 has completed his probation period as contemplated under Section 5(4) of the M.E.P.S.Act.

29. It appears that after the old Management came on the scene, the second termination order dated 12th March, 1997 came to be issued without mentioning any reason; which, ultimately, came to be set aside by the Tribunal.

30. The services of the confirmed employee can not be terminated in the manner in which services of the respondent no.1 were terminated. The approval to the appointment of respondent no.1 was upto 30.4.1997; whereas his services were terminated with effect from 20th April, 1997; that is much before the expiry of the period of approval. The termination is without giving prior notice of one month.

31. It is not dispute that the petitioner Management has recognized services of respondent no.1 rendered by him after the first termination order i.e. after 30.4.1997, till 20th April, 1997. For this period of employment of the respondent no.1 salary bills were raised to claim reimbursement of the salary paid to the respondent no.1. The very fact that the approval and salary for the subsequent period i.e. for the academic year 1996-97 was claimed, and accepted the reimbursement thereof from the Education Department by the petitioners,this itself, is sufficient to demonstrate that the reemployment of the respondent no.1 was accepted and thereby the first termination order dated 29.3.1996 was waived knowing full well consequences thereof.

32. The approvals are granted by the Education Department on year to year basis; since the purpose of the approval of the Education Department is only for the release of grant-in-aid by the State Government to the school-Management. However, grant of approval is not empty formality. The approvals are granted taking into account governing statute

and compliance thereof. When the approval is granted, one has to prima facie presume that the official act done in the official capacity must have been done taking into account all the factual aspects of the matter. The approval granted is not the subject matter of challenge in this petition. In absence of challenge to the second approval at the instance of school management; one has to presume that the same has been accepted and the order of said approval was in accordance with law and has become final and conclusive.

33. In the above, circumstances, petitioner - Management cannot be allowed to blow hot and cold to contend that there was no relationship of Master and servant between school Management and respondent no.1 during the period 30.4.1996 to 20.4.1997.

34. On the above canvas, the Tribunal was, perfectly justified in holding the action of the Management in terminating the services of the respondent no.1 was bad and illegal.

35. Broadly speaking an essential feature of a writ of Certiorary is that the control which is exercised through it over judicial or

quasi-judicial tribunals or bodies, is not in an appellate but supervisory capacity **(Sewpujanrai Indrasaurai Ltd V. Collector of Customs, A.I.R. 1958 SC 845).**

36. The writ of Certiorari can be issued to correct an error of law. But it is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record **(Hari Vishnu Kamath v. Ahmed Ishaque, A.I.R. 1955 SC 233).**

When Certiorari will be issued:-

(1) For correcting errors of jurisdiction as when an inferior Court or Tribunal acts, without jurisdiction or in excess of it or fails to exercise it.

(2) When the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving any opportunity to the parties to be heard or violates the principles of natural justice.

(3) The Court issuing a writ of

Certiorari acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the Court will not review findings of fact reached by the inferior court or Tribunal, even if they be erroneous.

(4) An error in the decision or determination itself may also be amenable to writ of Certiorari, if it is a manifest error apparent on the face of the proceedings, e.g., when it is based in clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by Certiorari but not mere wrong decision.

37. This is the principle that a Court; which has jurisdiction over a subject-matter, has jurisdiction to decide wrong as well as right and when the Legislature does not choose to confer a right of appeal against that decision it would be defeating its purpose and policy, if a superior court were to rehear the case on the evidence and substitute its own findings in "Certiorari".

38. These principles are well-settled in (**Hari Vishnu Kamath v. Ahmed Ishaque, AIR 1955 SC 233, Parry & Co. v. Commercial Employees Association, AIR 1952 SC 179, Veerappa Pillai v Raman and Raman Ltd., AIR 1952 SC 192, Ebrahim Aboobakar v Custodian General of Evacuee Property, AIR 1952 SC 319, Custodian, E.P. v Abdul Shukoor, AIR 1961 SC 1087).**

39. It must be mentioned that no perversity in the impugned order could be demonstrated by the learned counsel for the petitioner. This Court not being a Court of appeal is not expected to substitute it's views in place of findings of the Tribunal. Each and every finding of the Tribunal can be supported on the basis of material available on record. As such, the order of reinstatement with continuity of service and consequential benefits, except full backwages, passed by the Tribunal cannot be faulted.

40. It is no doubt true that the Tribunal while directing reinstatement has directed payment of full backwages and all other consequential benefits. The order of

termination is found to be illegal with effect from 30.4.1997. Order of reinstatement passed by the Tribunal is dated 13th April, 2004. During this period of seven years, one cannot presume that respondent no.1 was without any job or earnings. Some material in this behalf is available on record. One has to presume that he must have worked to earn his livelihood.

41. Apart from the above, the respondent no.1 did not render his services to the school during this period. The School-Management, if saddled with the huge financial liability of the arrears of salary; for the period of seven years; it might affect financial health of the school; which may not be in the interest of the institution and/or students. Under these circumstances, it was obligatory on the part of the school Tribunal to take into account all these factors while exercising discretion with regard to grant of full back wages. Hence the order of the Tribunal directing payment of full backwages needs to be substituted with that of 50% backwages from the date of termination till 28th February, 2005 i.e. till the date of reinstatement.

42. The Tribunal's order holding that the order of termination dated 29th March, 1996 as bad and illegal is confirmed. Direction to reinstate respondent no.1 with all consequential benefits is upheld. However respondent no.1 shall be entitled to only 50% backwages from the date of termination till 28th February, 2005 i.e. the date of resumption of duty, which the respondent no.1 shall be entitled to withdraw from the amount deposited with this Court, which Prothonotary and Senior Master shall pay by "Payee's Account Cheque" drawn in favour of the respondent no.1.

43. In the result, petition is partly allowed. Rule is made absolute in terms of this order with costs quantified in the sum of Rs. 10,000/- which the respondent no.1 shall be entitled to withdraw from the amount of deposit made by the petitioner with this Court.

44. At this stage, learned counsel for the petitioner urged that withdrawal of the

amount, as ordered herein, should be made subject to furnishing security. The prayer made cannot be accepted because the petition is being finally disposed of. No such prayer, at the stage of final disposal of the petition, can be granted. However, it would be open for the petitioner to take appropriate order in the appropriate proceedings if advised.

[V.C. DAGA,J]